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No. 03-956

In the

Supreme Court of the United States

BOY SCOUTS OF AMERICA AND CONNECTICUT RIVERS COUNCIL, BOY SCOUTS OF AMERICA,
Petitioners,

v.

NANCY WYMAN, in her capacity as Comptroller of the State of Connecticut and as a member of the Connecticut State Employee Campaign Committee, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF AMICI CURIAE OF PACIFIC LEGAL FOUNDATION, TONATIUH ALVAREZ, THE CLAREMONT INSTITUTE, AND THE VETERANS OF FOREIGN WARS OF THE UNITED STATES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Boy Scout leader-selection policies reflect the Scouts' constitutionally protected principles. May a government exact a price for adherence to those principles, by excluding the Scouts from a generally available government benefit, subsidy, program or facility unless they surrender their principles and abandon policies that express those principles?

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INTEREST OF AMICI CURIAE

Pacific Legal Foundation, Tonatiuh Alvarez, The Claremont Institute for the Study of Statesmanship and Political Philosophy, and the Veterans of Foreign Wars of the United States respectfully submit this brief amici curiae in support of the Petition for Writ of Certiorari.[1]

Amici file this brief to assist the consideration of important constitutional issues of free speech and expressive association.

Amicus Pacific Legal Foundation (PLF) is a nonprofit public interest law foundation headquartered in Sacramento, California, with a commitment to First Amendment freedoms. PLF submitted friend of the court briefs in defense of expressive and associational rights in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); *Boy Scouts of America v. Wyman*, 335 F.3d 80 (2d Cir. 2003); *Boy Scouts of America v. Till*, 136 F. Supp. 2d 1295 (S.D. Fla. 2001); and *Boy Scouts of America v. District of Columbia Comm'n on Human Rights*, 809 A.2d 1192 (D.D.C. 2002). PLF attorneys represent Tonatiuh Alvarez in his capacity as one of the petitioners in *Evans v. City of Berkeley*, 127 Cal. Rptr. 2d 696 (2002), *review granted*, California Supreme Court No. S112621 (Mar. 6, 2003) (concerning a punitive city policy directed at the *Evans* petitioners because of their affiliation with the Boy Scouts of America, (*see infra*)).

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[1] All parties have consented to the filing of this brief. Letters evidencing such consent have been lodged with the Clerk of the Court.

Amici Curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

PLF also supports robust enforcement of the unconstitutional conditions doctrine (one of the legal issues in the case at bar); PLF attorneys were counsel for petitioners in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), a landmark application of unconstitutional conditions analysis.

Amicus Tonatiuh Alvarez, a resident of Oakland, California, is one of the petitioners in *Evans, supra.* Currently pending before the California Supreme Court, *Evans* challenges a discriminatory berth fee imposed on the *Evans* petitioners at the City of Berkeley's Marina because of petitioners' status as Sea Scouts, and hence their affiliation with the Boy Scouts of America. The California Court of Appeal's rationale for upholding this punitive berth fee included arguments (*see, e.g.*, 127 Cal. Rptr. 2d at 703-05) that broadly parallel the Second Circuit's reasoning in permitting Connecticut to expel the Boy Scouts from its state employee charity campaign while allowing other nonprofits, with views more acceptable to government officialdom, to continue in the program.

Amicus The Claremont Institute for the Study of Statesmanship and Political Philosophy is a nonprofit educational foundation whose stated mission is to "restore the principles of the American Founding to their rightful and preeminent authority in our national life." The Institute pursues its mission through academic research, publications, scholarly conferences, and the selective appearance as amicus curiae in cases of constitutional significance. Of particular relevance here, the Institute has published extensively about the foundations of representative government and the constitutional protections of speech and association that are necessary to protect those foundations, including a monograph entitled "On the Front Lines of the Culture War: Recent Attacks on the Boy Scouts." In addition, the Claremont Institute, through its in-house public interest law unit, The Center for Constitutional Jurisprudence, has participated as an amicus curiae before this

Court in *Dale, supra,* and *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

Amicus Veterans of Foreign Wars of the United States (VFW) is a federally chartered voluntary membership corporation with a membership of more than 1.8 million veterans, most of whom are also members of local posts, which are themselves membership corporations or unincorporated associations. In addition to serving the interests of America's veterans through its Veterans Service, Legislative Service, and National Security programs, VFW is vitally interested in youth and community service programs, and many local posts and members work with local Boy Scout organizations to conduct activities that benefit the whole community. More importantly, VFW and its members are very interested in securing rights protected by the Constitution to take firm, if sometimes unpopular, positions on important social, political, religious, and moral issues, and associate with others of like mind, without fear of government retaliation or discrimination.

WHY THE WRIT SHOULD BE GRANTED

I

GOVERNMENT MAY NOT PENALIZE PRIVATE EXPRESSIVE ORGANIZATIONS FOR THEIR BELIEFS, EVEN IF THE PENALTY IS ACCOMPLISHED THROUGH AN OSTENSIBLY "NEUTRAL" "ANTIDISCRIMINATION" LAW

In *Dale,* this Court recognized 1) that the Boy Scouts of America is an expressive organization; 2) that criteria for selecting volunteer adult Scout leaders reflect core Scouting beliefs; and 3) that the First Amendment therefore bars government from compelling the Scouts to depart from their beliefs by abandoning their traditional selection criteria for adult leaders. 530 U.S. at 650-52.

The question raised by this case follows naturally from that in *Dale*: If government may not *force* the Scouts to

abandon their principles, may it *penalize or discriminate against* the Scouts because of those principles? The precedents of this Court answer, unambiguously, No. The ruling below answered, Yes. Therefore, a writ of certiorari should be granted.

Connecticut has expelled the Boy Scouts from a state charity fundraising program, while allowing hundreds of other nonprofit organizations to continue in the program, because of Scout leader-selection criteria that *Dale* recognized to be expressive in nature. The Scouts have been ousted because they embrace, and organize themselves in accordance with, convictions that state officials do not find acceptable. By approving the expulsion of the Scouts, the decision below violates this Court's teaching that government may not impose a price or visit punishment, retaliation or discrimination on private expressive organizations because of their viewpoints or exercise of First Amendment freedom of expressive association. Review by this Court is therefore appropriate, pursuant to Supreme Court Rule 10(c).

A. Even if Connecticut's Antidiscrimination Law Were Neutral in Intent, It Could not Constitutionally Exclude the Boy Scouts from a Government Program for Which They Are Otherwise Eligible

As Petitioners set out (Petition at 16-19), *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995), and its progeny bar government from excluding an otherwise-qualified expressive group from a government program on the basis of viewpoint.

Amici wish to reinforce this point by challenging the assertion of the court below that viewpoint-based exclusion is permissible when it is merely the incidental result of enforcing a "neutral," generally applicable law. Specifically, the court below stated that

> [w]here a law is on its face viewpoint neutral . . . but has a differential impact among viewpoints . . . [it] is viewpoint discriminatory only if *its purpose* is to impose a differential adverse impact upon a viewpoint.

Boy Scouts of America v. Wyman, 335 F.3d at 94 (citations omitted) (emphasis added).

This Court's precedents declare otherwise. In cases analogous to the one at bar, application of neutral statutes has been enjoined where First Amendment rights would be infringed. For instance, *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), prohibited the application of a public accommodations law so as to condition a permit for a Saint Patrick's Day Parade on the organizers' agreement to admit a gay and lesbian unit into the procession. The Court "was fully cognizant that the [public accommodations law] . . . did not target expression and was, itself, content-neutral," but, as applied, the law infringed on the expressive freedoms of the parade organizers, who objected to including a gay and lesbian message. Laurence H. Tribe, *Disentangling Symmetries: Speech, Association, Parenthood*, 29 Pepp. L. Rev. 641, 650 (2001) (citing *Hurley*, 515 U.S. at 572).

Likewise, *Dale* involved New Jersey's application to the Boy Scouts of a neutral public accommodations law. There was nothing on the face of the statute or in its legislative rationale indicating that it had been conceived with a purpose to suppress any particular viewpoint, or to target the Boy Scouts. Indeed, the "findings and declarations" accompanying the law declared that its purpose was purely protective—to shield the state's citizens from "economic loss; time loss; physical stress" and other hardships that could flow from the discrimination prohibited by the act. N.J. Stat. Ann. § 10:5-3. In other words, it paralleled what the court below found to be the purpose of the

Connecticut antidiscrimination law at issue in this case: "[T]o protect persons from the more immediate economic and social harms of discrimination." *Wyman*, 335 F.3d at 94.

Yet a neutral, nonpunitive purpose was not enough to permit the New Jersey Law Against Discrimination to be imposed so as to restrict the First Amendment rights of the Scouts. Professor Tribe notes how, in *Dale*, "a neutral rule of general applicability . . . [gave] way to [a] First Amendment objection . . . simply because the rule has the incidental effect, as applied to a particular group, of interfering with its freedom of expression." Tribe, *supra*, at 650.

To be sure, this outcome might seem inconsistent with the precedents cited by the court below (*Wyman*, 335 F.3d at 94), where neutral laws trumped constitutional claims made by parties to which the laws had been applied. But there is a crucial difference: *Dale* and *Hurley*, as Professor Tribe observes, involved *antidiscrimination* statutes (Tribe, *id.*, at 650)—as, of course, the present case does as well. When an antidiscrimination law is being applied, exemptions are in order for parties whose First Amendment rights would be incidentally infringed, because "one man's discrimination is another's expression of a moral view." Tribe, *supra*, at 651. In other words, the application of an antidiscrimination law *cannot be neutral* where what the state is calling "discrimination" is understood by the private expressive organization to be something altogether different—i.e., a sharing of certain core beliefs as articles of membership. Such cases, where the state brands a private group's belief-based membership policies as "discrimination," amount to a duel of definitions,

> a direct clash of competing images of "the good life." And, in such a clash, the teaching of the First Amendment has long been that the state loses.

Tribe, *supra*, at 651-52.

Expressive association is a fundamental freedom for which the pejorative term, "discrimination," should not be ritually applied as a synonym. After all, to the degree that any private organization, whatever its philosophical complexion, makes shared convictions a condition of belonging, it excludes those who do not hold those tenets, and therefore it could be called a "discriminator." But to use that epithet in such a context devalues and denigrates the freedom of expressive association. The importance of associational freedom cannot be overstated: America's rich web of private associations nourishes our common life and safeguards our freedoms. Besides serving as outposts of philanthropy and social service, private associations are the life force of American diversity and pluralism. They ensure that there are institutions other than the state to which individuals look for philosophical kinship and tutelage. This is why de Tocqueville celebrated America's profusion of private associations not merely as a force for social betterment but also as a "dike to hold back tyranny of whatever sort." Alexis de Tocqueville, *Democracy in America* 177 (J.P. Mayer and Max Lerner, eds., Harper & Row, 1966).

Unfortunately, the ruling below includes rhetoric echoing the myopic perspective that reflexively equates the exercise of associational rights with "discrimination." Thus, the court describes the Scouts as "anti-homosexual." *Wyman*, 335 F.3d at 86. This disparaging term cannot be squared with the Scout Law and Scout Oath, which pledge respectful treatment toward all people. Indeed, the dissenters in *Dale* made much of the fact that the Boy Scouts in their formal literature do not voice hostility to homosexuals (530 U.S. at 660)—as if one has to be negative toward others, and must loudly snarl that negativity, as a condition of claiming First Amendment associational liberties! Professor Tribe has identified, in the Boy Scout Handbook, the quiet statements of belief that were ultimately at issue in *Dale*—and they are about positive aspirations, not enmity toward others:

> The Boy Scouts, as their pre-litigation literature makes clear, are dedicated to teaching that the good life is one that foreswears promiscuity, practices sexual abstinence until marriage, respects and protects the young woman who is the object of the scout's romantic and lustful impulses, and looks forward to the ultimate satisfaction of fathering children.

Tribe, *supra*, at 649 (citing The Boy Scout Handbook (10th ed. 1990)).

Connecticut cannot be allowed to redefine the Scouts' constitutionally protected expressive association as "discrimination" that subjects the Scouts to legal disabilities. When a neutral "antidiscrimination" law is applied against private policies that are grounded in expression protected by the First Amendment, the statute becomes, in that application, not an "antidiscrimination" law but an "anti-First Amendment" law. This is why application of such laws against protected expression was enjoined in *Hurley* and *Dale*—and this is why a writ of certiorari should be granted here.

B. The Constitution Bars "Indirect" Penalties for the Exercise of First Amendment Rights as Much as Direct Proscription of Those Rights

The court below (*Wyman*, 335 F.3d at 91) posits a distinction between "direct," "immediate" burdens on First Amendment rights—such as New Jersey's decree, in *Dale*, that the Scouts abandon their belief-based membership policies—and Connecticut's "conditioned exclusion" of the Scouts from its charity fundraising program, a policy which, as the court puts it, "does not rise to the level of compulsion."

From the standpoint of the Constitution, this is a distinction without a difference. This Court's precedents establish that *penalizing* the exercise of First Amendment rights —for instance, by excluding an organization from a generally

available government program, subsidy, or facility on viewpoint grounds—is as impermissible as *outlawing* the exercise of First Amendment rights.

Thus, in *Rosenberger*, 515 U.S. at 829, this Court invalidated a public university's denial of subsidies to a student journal expressing religious viewpoints at the same time that the university was providing subsidies to journals with other viewpoints. The university's policy did not "rise to the level of compulsion" in the sense of an outright prohibition of the religious journal or its message. But the unequal treatment—the withholding of generally available funds—was still unconstitutional. It "offend[ed] the First Amendment when [the University of Virginia] impos[ed] financial burdens . . . based on the content of [the religious journal's] expression." 515 U.S. at 828 (citing *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991)). In the same way, Connecticut offends the First Amendment when it imposes a financial burden on the Boy Scouts by excluding them from a fundraising program that remains open to organizations whose viewpoints are more acceptable to officialdom.

Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993), also contradicts the court below. *Lamb's Chapel* overturned a school district's refusal to allow a church to show a film with a religious viewpoint on school grounds that were open to community groups with other viewpoints. *Lamb's Chapel* teaches that the First Amendment bars government not only from *prohibiting* free speech, but also from "*discriminat*[*ing*] *against* speech on the basis of its viewpoint." *Rosenberger*, 515 U.S. at 829 (emphasis added) (citing *Lamb's Chapel*, 508 U.S. at 392-93). By excluding the Boy Scouts from a public program that remains open to nonprofits with viewpoints more acceptable to government, Connecticut is "discriminat[ing] against speech on the basis of

its viewpoint"—something that is not allowed even if it does not "rise to the level of compulsion."

The teaching that "indirect" assaults on constitutional rights are no more allowable than "direct," "immediate" infringements is distilled in the doctrine of unconstitutional conditions. Conditioning a government benefit (such as access to a government charity fundraising program) on an expressive organization's agreement to surrender constitutional rights, is a form of pressure that is constitutionally indistinguishable from compulsion. Hence, "[t]he unconstitutional conditions doctrine prevents the government from penalizing those who exercise their constitutional rights by withholding a benefit that would otherwise be available." Erwin Chemerinsky, *Constitutional Law: Principles and Policies*, 796 (2d ed., 2002) (citations omitted).

In *Nollan v. California Coastal Commission*, this Court employed unconstitutional conditions analysis in affirming the petitioners' right not to have private property taken by the state without the compensation guaranteed by the Fifth Amendment.

Nollan held that the Coastal Commission acted unconstitutionally when it refused to issue a building permit to the Nollans unless they agreed to grant an unrelated public easement on their property. 483 U.S. at 836. *Dolan v. City of Tigard*, which built on *Nollan*, made the reliance on the unconstitutional conditions doctrine even more explicit:

> Under the well-settled doctrine of "unconstitutional conditions," the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government

> where the benefit sought has little or no relationship to the property.

512 U.S. 374, 385 (1994).

Just as conditioning a benefit on the relinquishment of rights is prohibited in the realm of the Fifth Amendment, so it is barred as a device to undermine First Amendment freedoms. Indeed, the principle that government "'may not deny a benefit to a person on a basis that infringes his constitutionally protected interests'" is "*especially*" true where "'his interest [is] in freedom of speech.'" *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484; 513 (1996) (citation omitted) (emphasis added). Connecticut's application of its antidiscrimination law to the Scouts must be disallowed because it presents the classic unconstitutional-conditions scenario in the First Amendment context: The state withholds the benefit of a fundraising program that is available to other nonprofit organizations, unless the Scouts abandon leadership policies that embody their core principles. Connecticut is attempting to do indirectly what *Dale* said it could not do directly: compel the Boy Scouts to abandon a basic belief and a policy derived from it.

The court below suggests that the doctrine of unconstitutional conditions does not extend to First Amendment *expressive association*; the court contends that in this particular context, "conditioned exclusion" of an expressive organization is permissible when it is the result of a viewpoint-neutral and reasonable law. *Wyman*, 335 F.3d at 91. *Hurley*, however, teaches the opposite. *Hurley* establishes that an antidiscrimination law, even if facially neutral, may not require an expressive organization to relinquish its beliefs on pain of being denied a government benefit for which it is otherwise eligible (such as a parade permit).

This Court in *Dolan* insisted that property rights are not to be treated as a "poor relation" to First Amendment rights. 512 U.S. at 392. Ironically, the court below would treat First

Amendment rights as a "poor relation" by allowing the Scouts' expressive associational rights to be subjected to the sort of carrot-and-stick unconstitutional condition that was disallowed, in *Nollan* and *Dolan*, when the target was property rights.

The crux of this case is revealed in a telling admission by the court below: The Scouts are being made to "pay[] a price" for "exercising . . . First Amendment rights." 335 F.3d at 95 n.8. The court's candor should be fatal to Connecticut's case. As *Rosenberger* ruled, government may not impose "financial burdens . . . based on the content of [an organization's] expression." 515 U.S. at 828 (citations omitted). Because the court below gave its approval to an assault on First Amendment rights that forces the Scouts to "pay a price" for their freedoms, and because this assault is no less impermissible for being "indirect," a writ of certiorari should be granted.

II

A RECURRING ISSUE OF NATIONAL IMPORTANCE IS PRESENTED IN THIS CASE

Dale is one of the seminal civil rights cases of the last 100 years, because it rejected the ominous idea that government may compel private expressive organizations to abandon their beliefs and belief-based membership policies. If the Boy Scouts had been forced to exchange their creed and membership rules for a belief system scripted by the state, the implications for expressive organizations across the philosophical spectrum would have been frightening. Writing in a pre-*Dale* case, California Supreme Court Justice Kennard articulated the peril: If the right of expressive association is denied the Scouts, "[c]ould the NAACP be compelled to accept as a member a Ku Klux Klansman? Could B'nai B'rith be required to admit an anti-Semite?" *Curran v. Mount Diablo Council of the Boy Scouts of America*, 952 P.2d 218, 257 (Cal. 1998) (Kennard, J., concurring).

Alarmingly, in the more than three years since *Dale* was handed down, a number of government entities, in various parts of the country, have put their energies into schemes to subvert it. Connecticut is not alone in trying to muscle the Scouts into relinquishing freedoms that *Dale* recognized as protected by the First Amendment. Among other examples of such unconstitutional armtwisting:

- A few months after *Dale* was issued, the school board of Broward County, Florida voted to prohibit the local Scouts from further use of school facilities after hours—while continuing to allow other private groups to meet on school premises. Notably, the school board acted in furtherance of an ostensibly "neutral" antidiscrimination rule. *Boy Scouts of America v. Till,* 136 F. Supp. 2d at 1297. The district court issued a preliminary injunction, holding that the School Board could not "punish [the Scouts] for [the Scouts'] own message." *Id.* at 1308. Citing *Dale* for the principle that the Scouts have a First Amendment right to their beliefs (*id.*), the court informed the school district that "[o]nce the state has opened a limited public forum, it may not . . . discriminate against speech on the basis of its viewpoint." *Id.* (citing *Lamb's Chapel*, 508 U.S. at 392-93).

- In June, 2001, the District of Columbia Human Rights Commission indulged in perhaps the most audacious nose-thumbing at *Dale* to date. The Commission demanded that the local Scouts readmit two men as adult members who had been dismissed because they were acknowledged homosexuals. *Boy Scouts of America v. District of Columbia Comm'n on Human Rights*, 809 A.2d at 1195-97. The Commission's decree mirrored the New Jersey Supreme Court's order reinstating a homosexual Scout leader, in the decision that was overruled by *Dale*, 530 U.S. at 636. The District of Columbia Court of Appeals reversed, pointing out that the Commission's action could not "be reconciled with *Dale*." 809 A.2d at 1200.

- In August, 2002, the city council of Ann Arbor, Michigan, withdrew the city from United Way participation, because of the Scouts' leader-selection policies. Subsequently, Washtenaw United Way officials voted to stop directing any United Way funds to the Boy Scouts, and the city responded by rejoining the United Way's fund raising campaign. *See* Maryanne George, *Ann Arbor, United Way Reunite; Group Alters Scout Tie Over Its Ban on Gays*, Detroit Free Press, Mar. 6, 2002 (2002 WL 16412362).

- In October, 2002, the board of supervisors of Multnomah County, Oregon, passed a measure threatening to halt the United Way's annual giving campaign among county employees if the United Way did not withhold money from the Boy Scouts because of Scout leadership criteria. *See* Scott Learn, *County Gives United Way a Deadline*, Portland Oregonian, Oct. 4, 2002 (2002 WL 3977354). Multnomah County Code § 9.630. The government pressure had the desired effect: In April of 2003, The United Way of the Columbia-Willamette adopted a new policy that will prohibit the Boy Scouts of America from receiving regular contributions as long as the Scouts continued to conform their membership policies with their beliefs on matters of sexual orientation. *See* David Austin, *United Way Adds Anti-Bias Rule*, Portland Oregonian, Apr. 4, 2003 (2003 WL 3815893).

- In November, 2002, a California court of appeal upheld a punitive berth fee at the Berkeley Marina that the City of Berkeley imposes on the Berkeley Sea Scouts because of their affiliation with the Boy Scouts of America, and because Berkeley officials consider the Boy Scouts a "discriminatory" organization. *See Evans*, 127 Cal. Rptr. 2d at 696. The California Supreme Court has granted review. Pacific Legal Foundation attorneys represent Amicus Tonatiuh Alvarez as one of the petitioners challenging Berkeley's financial punishment of the Sea Scouts as a violation of First Amendment and Equal Protection rights. As in the case at bar,

the court of appeal approved the imposition of the berth fee on the Sea Scouts with the rationale that it results from the application of a supposedly neutral antidiscrimination law. *Evans*, 127 Cal. Rptr. 2d at 703-05.

- In July, 2003, a federal district court in San Diego ruled that the city's lease of park property to the Boy Scouts violates the federal Establishment Clause, because the Scouts' core principles include belief in God. *Barnes-Wallace v. Boy Scouts of America*, 275 F. Supp. 2d 1259 (S.D. Cal. 2003). Many other nonprofits, with different viewpoints, continue to enjoy leases of city property, including park property. Nevertheless, the court rejected the argument that voiding the Scouts' lease amounts to discrimination against Scout viewpoints that enjoy constitutional protection in accordance with *Dale*. *Barnes-Wallace*, 275 F. Supp. 2d at 1288. In dicta, the court cited the case at bar in claiming that the city could itself choose to exclude the Scouts because of their membership policies, if it did so through a "viewpoint neutral" law and with an aim "to protect persons from the effects of discrimination and not to exact a price for the organization's protected expression." *Id.* (citing *Wyman*, 335 F.3d at 93-94).

In sum, even though the Scouts turned back assaults on their freedoms in Broward County and the District of Columbia, various government entities and officials still advance the notion that the Scouts may be punished for exercising the rights acknowledged in *Dale*.

These efforts at end runs around *Dale* carry disquieting reminders of the disrespect that greeted another landmark civil liberties decision, *Brown v. Board of Education*, 347 U.S. 483 (1954). Local public officials in much of the South engaged in "subterfuges that evaded or drastically slowed desegregation." Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 Yale L.J. 999, 1014 (1989) (citation omitted).

This Court denied the authority of inferior tribunals or officeholders to disobey *Brown*. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). So, too, Connecticut's attempt to undermine *Dale* must be rejected. The word must go out that subterfuges must cease and the Scouts' civil rights must be respected.

That the Boy Scouts of America, of all organizations, should be subjected to legal and financial disabilities defies more than this Court's precedents; it also assails common sense. Anti-Scout initiatives by government officials should roil the social conscience of everyone concerned about the welfare of youth. The good work that the Scouts do for boys of all backgrounds was well summarized by the Seventh Circuit:

> Successful self-government requires that citizens willingly participate in public affairs, make sacrifices for the common good, curb their selfishness, and join in taking responsibility for themselves and others. The central question for those concerned about maintaining the health of our republic must be, "how do individuals acquire the virtues necessary for self-government?" History provides only one answer: through the institutions of civil society, like the family, religious groups, and voluntary associations, which inculcate a sense of moral values in the young. Throughout its . . . existence, the Boy Scouts have successfully presented its combination of educational, social, athletic, craft, wilderness training and outdoor activities to our young people. The leadership of many in our government is a testimonial to the success of Boy Scout activities. In recent years, single parent families, gang activity, availability of drugs and other factors have increased the dire need for support structures like the Scouts. When the government . . . seeks to regulate the membership of an organization like the Boy Scouts in a way that scuttles its founding principles, we run

> the risk of undermining one of the seedbeds of virtue that cultivate the sorts of citizens our nation so desperately needs.

Welsh v. Boy Scouts of America, 993 F.2d 1267, 1278 (7th Cir. 1993).

How ironic, how socially destructive, that Connecticut and other misguided governments are working to undermine such a beneficial organization. The ultimate victims of these ideologically inspired crusades are the boys who will be denied opportunities because of lost funding. Government attacks on the Scouts are not just destructive in terms of policy, however. Making the Scouts pay a price for exercising their First Amendment rights is also unconstitutional. The fact that this assault on civil liberties is not limited to Connecticut underscores the case for granting the Boy Scouts' petition.

CONCLUSION

"[G]eneral antidiscrimination statutes [ought not to be] read expansively, beyond their clear application, when the broad reading would directly burden protected First Amendment rights." William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 Yale L.J. 2411, 2462-63 (1997), *quoted in Curran v. Mount Diablo Council of the Boy Scouts of America*, 17 Cal. 4th at 728 (Kennard, J., concurring). This Court's precedents go further, by exempting expressive associations even from facially neutral antidiscrimination laws, where application of such a law would curtail or penalize the exercise of First Amendment rights. The First Amendment trumps any state effort to subject free speech

and association rights to legal disabilities. Because the court below failed to acknowledge this fact, amici respectfully request that this Court grant a writ of certiorari.

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Respectfully submitted,

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